Do Thanh Nhan & 22 Ors v Malaysia Maritime Enforcement Agency

HIGH COURT (MIRI) — CRIMINAL APPEAL NO MYY-41A S-1/8 OF 2015
MAIRIN IDANG JC
18 NOVEMBER 2015

Fisheries — Enforcement — Procedure — Whether Malaysian Maritime Enforcement Agency ('MMEA') had power to enforce Fisheries Act 1985 in Malaysian Maritime Zone — MMEA officers apprehended group of Vietnamese fishing illegally in Malaysian waters — Whether magistrate's sentencing of offenders and ordering forfeitures of fishing vessel, fish and other paraphernalia used in commission of offence accorded with law

The 23 appellants, all Vietnamese, pleaded guilty in the magistrate's court to a charge under s 15(1)(a) of the Fisheries Act 1985 ('the FA') of fishing illegally in Malaysian waters. Pursuant to the provisions of the FA, the magistrate fined the first appellant, as owner or master of the fishing vessel, RM100,000 in default two months' jail whilst the 22 other crew members were each fined RM20,000 in default a month's jail. The vessel and the proceeds of sale of the fish caught, and the diesel used, in the commission of the offence, were ordered to be forfeited to the government. In their instant appeal against the decision, the appellants questioned the legality of the sentencing and forfeitures contending that the respondent ('MMEA') had no power to enforce laws under the FA and that therefore the entire prosecution of the appellants was invalid. The respondent replied that it was empowered by the Malaysian Maritime Enforcement Agency Act 2004 ('the MMEA Act') to make arrests in respect of, and investigate, all offences committed in the Malaysian Maritime Zone which included offences under the FA.

Held, dismissing the appeal:

(1) On reading the provisions of both the MMEA Act and the FA, the court found the MMEA was empowered to enforce the provisions of the Fisheries Act. There was also no requirement for an order to investigate to be issued under s 25(a) of the FA (see paras 15 & 20).

(2) It was Parliament's intention when enacting the MMEA Act that MMEA should have all the powers to enforce any federal law applicable in the Malaysian Maritime Zone including the enforcement of the FA. Malaysian Maritime Zone meant 'the internal waters, territorial sea, continental shelf, exclusive economic zone and the Malaysian fisheries waters and includes the air space over the zone' (see paras 16–17).

(3) The order of forfeiture by the magistrate was in accordance with law (see para 20).

[Bahasa Malaysia summary

Kesemua 23 perayu berbangsa Vietnam, mengakui bersalah di mahkamah majistret kepada tuduhan di bawah s 15(1)(a) Akta Perikanan 1985 ('AP') kerana menangkap ikan secara haram di perairan Malaysia. Berikutan peruntukan-peruntukan AP, majistret mengenakan denda terhadap perayu pertama, sebagai pemilik atau nakhoda kapal penangkapan ikan, RM100,000 jika ingkar dua bulan penjara sementara 22 anak kapal yang lain didenda RM20,000 setiap seorang jika ingkar sebulan penjara. Kapal dan keuntungan jualan ikan yang ditangkap, dan diesel yang digunakan, dalam perlakukan kesalahan tersebut, diperintahkan dirampas dan diserahkan kepada kerajaan. Dalam rayuan mereka ini terhadap keputusan tersebut, perayu-perayu menyoal kesahan hukuman dan perampasan tersebut dengan berhujah bahawa responden ('MMEA') tidak mempunyai kuasa untuk menguatkuasakan undang-undang di bawah AP dan bahawa oleh itu keseluruhan pendakwaan terhadap perayu-perayu adalah tak sah. Responden menjawab bahawa ia diberi kuasa oleh Akta Agensi Penguatkuasaan Maritim Malaysia 2004 ('Akta APMM') untuk membuat penangkapan berkaitan, dan menyiasat, kesemua kesalahan yang dilakukan di Zon Maritim Malaysia yang mana termasuk kesalahan-kesalahan di bawah AP.

Diputuskan menolak rayuan:

(1) Atas pembacaan peruntukan-peruntukan kedua-dua Akta APMM dan AP, mahkamah mendapati MMEA diberi kuasa untuk menguatkuasakan peruntukan-peruntukan AP. Juga tidak terdapat keperluan bagi perintah untuk menyiasat dikeluarkan di bawah s 25(a) AP (lihat perenggan 15 & 20).

(2) Ia adalah niat Parlimen apabila mengubal Akta APMM bahawa MMEA patut mempunyai kesemua kuasa untuk menguatkuasakan mana-mana undang-undang persekutuan yang diguna pakai di Zon Maritim Malaysia termasuk penguatkuasaan AP. Zon Maritim Malaysia bermaksud 'the internal waters, territorial sea, continental shelf, exclusive economic zone and the Malaysian fisheries waters and includes the air space over the Zone' (lihat perenggan 16–17).

(3) Perintah perampasan oleh majistret adalah mengikut undang-undang (lihat perenggan 20).]

Notes

For a case on procedure, see 7(3) *Mallal's Digest* (5th Ed, 2015) para 4831.

Cases referred to

Bang Giok Kiom & Yang Lain lwn PP [2011] 1 CLJ 643, HC (refd)
Chua See Chin v Director Ministry of Domestic Trade Cooperative and Consumerism & anor [2015] 7 MLJ 865, HC (refd)
Commissioner of Income Tax v Shahzadanabd & Anor 1966 AIR 1342, SC (refd)
Irwan bin Abdullah & Ors v PP [2002] 2 MLJ 577; [2002] 3 CLJ 151, HC (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)
PP v Ismail bin Yusof [1979] 2 MLJ 119, FC (refd)
PP v Narongne Sookpavit & Ors [1987] 2 MLJ 100 (refd)
PP v Sai & Ors [1980] 2 MLJ 153 (refd)
Trans Huu Tho & 11 Ors v PP ; Nguyen Trong Hoang & 9 Ors v PP [2008] MLJU 860; [2009] 3 CLJ 102, HC (refd)

Legislation referred to

Criminal Procedure Code ss 2, 305
Fisheries Act 1985 ss 2, 4, 15(1)(a), (1)(a)(i), 25, 25(a), 36, 47, 47(1), 47A, 47B, 47C, 47D, 52, 52(1)(a)(i), (1)(a)(ii)
Malaysian Maritime Enforcement Agency Act 2004 ss 2, 3, 3(2), 5, 6, 7, 7(1), (2)(d), (3)
Penal Code s 34

CM Sundram (CM Sundram & Co) for the appellant.
Syazana bt Abd Lajis Malaysia (Deputy Public Prosecutor, Maritime Enforcement Agency) for the respondent.

Mairin Idang JC:

[1] I shall refer the 23 appellants as the accused and the respondent as the prosecution.

[2] The accused who were all Vietnamese were charged under s 15(1)(a) of the Fisheries Act 1985 read together with s 34 of the Penal Code punishable under s 25(a) of the same Act ('Act 317').

[3] The charge read as follows:

> That all you Do Thanh Nhan together with 22 others (as in Appendix A) on April 6, 2015 at approximately 2130H on fishing vessel registration number KG94004TS positioning at Latitude 04013.540 North and Longitude 1130 13.540 East at a distance of approximately 43 nautical miles from the coast of Miri, Sarawak within Malaysian Fisheries Waters found to have been engaged in fishing activity without any permit issued by the General Director of Fisheries Malaysia which cause such act to be an offence under section 15(1)(a) Fisheries Act 1985. As

such, you are hereby found to have committed an offence under section 15(1)(a) Fisheries Act 1985read together with section 34 of the Penal Code which is punishable under section 25(a) of the same Act (Act 317).

Punishment:

Section 25(a) to a fine not exceeding one million ringgit (RM1,000,000.00) each in the case of the owner or master, and one hundred thousand ringgit (RM100,000.00) in the case of every member of the crew.

Section 52(1)(a)(i): The court shall, in addition to any order penalty that may be imposed for an offence under section 15(1)(a)(i) order the vessel (including its equipment, furniture, appurtenances, stores, cargo and fishing appliance), vehicle, article or thing used in the commission of such offence or in relation to which such offence has been committed be forfeited.

Section 52(1)(a)(II): order that any fish caught in the commission of such offence or the proceeds of sales of the fish or other article of a perishable nature and any explosive, poison, pollutant, apparatus or prohibited gear used or intended to be used in the commission of such offence be forfeited.

[4] The accused were represented by Mr CM Sundram ('Mr Sundram') while Pn Iris Awen, Pn Sharifah Nora bt Othman and En Mohd Farid bin Mohd Mokhtar in between them had appeared for the prosecution.

[5] Initially the accused claimed trial at the magistrate court. However after the prosecution had called three witnesses all of the accused decided to plead guilty on the 21 July 2015. On the 22 July 2015 after hearing submissions from both Mr Sundram and the prosecution, the learned magistrate recorded a conviction on all accused. The learned magistrate imposed a fine of RM100,000 in default of two months imprisonment on the first accused whilst the other 22 accused are respectively imposed with a fine of RM20,000 each in default of one month imprisonment. The Vessel KG94004TS ('the vessel') with other exhibits were forfeited pursuant to s 52 of the Fisheries Act 1985. The proceeds of sale of the fish in the sum of RM3,100 and the proceeds of sale of the diesel amounting to RM4,736.80 were also forfeited as government revenue. The accused however did not pay their fines and served their respective imprisonment.

[6] On the 24 July 2015 the accused filed their notice of appeal 'against conviction, sentencing and order of forfeiture of the vessel KG94004TS together with all exhibits tendered and that the proceeds of the sale of diesel and fish be forfeited as government revenue after a lapse of the appeal period'.

[7] On the 29 July 2015 the petition of appeal was filed. I have summarised the petition as follows:

(a) the Malaysian Maritime Enforcement Agency ('MMEA') does not have

the powers of investigation over an offence under s 15(1)(a) of the Fisheries Act 1985 ('the Fisheries Act') because it is specifically provided under s 47A of the Fisheries Act 1985 of the same Act that the power of investigation in all fisheries offences is solely vested in the fisheries officers. That the Fisheries Act does not empower other agency to make investigation. The Fisheries Act is not linked to the Criminal Procedure Code ('the CPC') ('Act 593');

(b) the offence under s 15(1)(a) is deemed a non-seizable offence as such the order to investigate ('OTI') had to be issued before commencement of investigation. Since no OTI was obtained from the public prosecutor the forfeiture of the vessel as well as the conversion to government revenue of the proceeds of the sale of fish and diesel under s 25(a), 52(1)(a)(i) and (ii) of the Fisheries Act was ultra vires of the Fisheries Act 1985;

(c) it was not spelt out in the main charge the punishments which might be imposed on the accused; and

(d) the order of forfeiture was not mandatory because the word 'shall' does not mean 'mandatory'.

[8] The accused and the prosecution had filed their respective written submissions. On the 18 November 2015 I dismissed the appeal. Herein are the grounds of my decision.

[9] In his submission Mr Sundram had submitted that the accused appeal was against the legality of sentence and forfeiture of the vessel, proceeds of sale of fish and diesel. Mr Sundram went on to submit '… although we are restricted to just appealing against the legality of the sentencing, we nevertheless contend that because the Malaysian Maritime Enforcement Agency officers lack the power to enforce laws under the Fisheries Act 1985, their action has resulted in the entire prosecution of the appellants, null and void'. Mr Sundram had referred to me ss 2, 4, 25, 36, 47 and 52 of the Fisheries Act.

[10] From the tone of Mr Sundram's submission he appeared to concede that the accused after pleading guilty could only appeal on the validity of the sentence. To me and as pointed out by the prosecution the law is very clear that where the accused had pleaded guilty to the charge as was done in this case the appeal shall only in regards to the extent and legality of the sentence as provided under s 305 of the Criminal Procedure Code ('the CPC').

[11] The prosecution submitted that the Malaysian Maritime Enforcement Agency Act 2004 ('the MMEA Act') empowers MMEA to arrest and investigate all offences committed in the Malaysian Maritime Zone which includes offences under the Fisheries Act. The prosecution had referred to me to ss 2, 3, 5, 6 and 7 of the MMEA Act.

[12] I shall now consider whether MMEA has the power to enforce the provisions of the Fisheries Act. Let me refer to those relevant sections of the Fisheries Act and MMEA Act which were referred to by both parties:

Fisheries Act 1985

Section 2 is to do with interpretation.

Section 4 is to do with the appointment of fisheries' officers and deputy fisheries officers.

Section 36 is to do with the appointment of other persons to be the authorized officers.

Section 52 empowers to Court to make an order of forfeiture and disposal of the vessel (including its equipment, cargo, fishing appliance etc) used in the commission of such offence and also fish caught in the commission of such offence.

Malaysian Maritime Enforcement Agency Act 2004

Section 2 is the interpretation.

> 'relevant agency' means a body or agency that is for the time being responsible in Malaysia *for the enforcement of any federal law* which is applicable in the Malaysian Maritime Zone. (Emphasis added.)
>
> *'offence' means any offence under any federal law which is applicable in the Malaysian Maritime Zone.*
>
> 'Malaysian Maritime Zone' means the internal waters, territorial sea, continental shelf, exclusive economic zone and the Malaysian fisheries waters and includes the air space over the Zone.

Section 3 is to do with the establishment of the Malaysian Maritime Enforcement Agency.

In s (3)2 it is stated 'the Agency shall, be subject to this Act, be employed in the Malaysian Maritime Zone for the maintenance of law and order, the preservation of the peace, safety and security, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.

Section 5 is the appointment of other officers of the agency.

s 5(2): The Yang di-Pertuan Agung may, in the order made under subsection (1), determine that the ranks of such appointed officers shall be regarded as equivalent to the ranks of –

(a) Police officers as specified in or under the Police Act 1967 [Act 344];

(b) Officers of customs as specified in or under the Customs Act 1967 [Act 235]; and

(c) Any other officers whose ranks are specified in or under any other written law,

and the Criminal Procedure Code [Act 593] and laws specified in section 7(3) shall be construed accordingly.

Section 6 is to do with the functions of the Agency.

S 6(1) *The functions of the Agency shall be* –

(a) *to enforce law and order under any federal law;*

(b) to perform maritime search and rescue;

(c) to prevent and suppress the commission of an offence;

(d) –

(e) –

(f) –

Section 7 is to do with powers of the Agency.

S 7(1): The Agency shall have powers to carry out the purposes mentioned in subsection 3(2) and to do all things reasonably necessary for or incidental to the performance of its functions under section 6.

(2) In particular, but without prejudice to the generality of subsection (1), the Agency shall have power –

(a) to receive and consider any report of the commission of offence;

(b) to stop, enter, board, inspect and search any place, structure, vessels or aircraft and to detain any vessel or aircraft;

(c) to demand the production of any licence, permit, record, certificate or any other document and to inspect such licence, permit, record, certificate or other document or make copies of or take extracts from such licence, permit, record, certificate or other document;

(d) to investigate any offence which it has reason to believe is being committed, or is about to be committed or has been committed;

(e) –

(f) to examine and seize any fish, article, device, goods, vessel, aircraft or any other item relating to any offence which has been committed or it has reason to believe has been committed;

(g) to dispose of any fish, article, device, goods, vessel, aircraft or any other item relating to any offence which has been committed or it has reason to believe has been committed;

(h) to arrest any person whom it has reason to believe has committed an offence; and

(i) ...

(3) *Without prejudice to the generality of subsection (1), an officer of the Agency shall have, for the purpose of this Act, all the powers which any relevant agency may exercise under any federal law which applicable in the Malaysian Maritime Zone.* (Emphasis added.)

[13] Mr Sundram had raised that s 25(a) of the Fisheries Act does not state it to be a seizable offence which is arrestable without warrant and as such an order to investigate ('OTI') was required for the purpose of investigation. Mr Sundram said the CPC applies in the Fisheries Act and as the procedures had not been complied with by the MMEA under s 25(a) of the Fisheries Act being non seizable offence the investigation was null and void. Mr Sundram also said that s 47A of the Fisheries Act is of not help as the same relates to the powers of investigation by fisheries officers only but does not include the officers of MMEA.

[14] The prosecution submitted s 25(a) of the Fisheries Act is a provision with regards to sentence though it does not provide imprisonment term. The prosecution contended that the offence under the said section is seizable as s 47(1) of the Fisheries Act provides for an arrest without warrant. The prosecution also said that although s 2 of the CPC explains what are seizable offences or warrant of arrest, s 47 of the Fisheries Act applied in the present case. The prosecution said the Fisheries Act is a specific Act whilst the CPC is a parent Act/general provisions. It is the prosecution submission that OTI was not applicable for offences under the Fisheries Act by virtue of the maxim generalibus specilla derogant. The prosecution submitted '... legal maxim of generalibus specilia derogant simply means that where a written law has specifically provide for a matter, that will override the general provisions respecting it.' The prosecution therefore contended that the Fisheries Act excludes the application of the CPC in regards to offences under the Fisheries Act. The prosecution submitted the specific provision takes precedence and that s 47 of the Fisheries Act governs the procedure of arrest and investigation and not the CPC. The prosecution had also referred to *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119, *Chua See Chin v Director Ministry of Domestic Trade Cooperative and Consumerism & anor* [2015] 7 MLJ 865 and

Commissioner of Income Tax v Shahzadanabd & Anor 1966 AIR 1342, at p 1347.

[15] Having read ss 2, 4, 25, 36, 47 and 52 of the Fisheries Act and ss 2, 3, 5, 6 and 7 of the MMEA Act and the CPC as well those cases referred to by the prosecution I cannot but agree with the prosecution that MMEA is empowered to enforce the provisions of the Fisheries Act. I agree with the prosecution that ss 2, 4 or 36, 47A to 47D of the Fisheries Act must be read with ss 2, 3, 5, 6 and 7(1), 7(2)(d) and 7(3) of the MMEA Act. I also agree with the prosecution that there was no requirement of OTI under s 25(a) of the Fisheries Act. But I cannot agree with Mr Sundram's submission that the provisions of the MMEA Act 2004 are not applicable 'unless it is expressly provided for in other federal laws that the said officers can act in accordance with their provisions'.

[16] I am all the more convinced that it was the intention of the Parliament when enacting the MMEA Act that MMEA shall have all the powers which any relevant agencies may exercise under any federal laws which are applicable in the Malaysian Maritime Zone which include the enforcement of the Fisheries Act as against the accused and this intention was made clear and reported in *Hansard*. Puan Sharifah Nora bt Othman for the prosecution had referred me to that passage where the Minister Dato' Seri Mohamed Nazri bin Abdul Aziz when introducing the MMEA bill had this to say at pp 62 and 80: '*... APMM merupakan agensi utama yang akan melaksanakan penguatkuasaan, oleh yang demikian tidaklah berlaku tolak-menolak agensi ...tetapi yang ini semua undang-undang persekutuan yang berkaitan dengan lautan. Penguatkuasaannya adalah di bawah APMM. Pun begitu, agensi yang lain akan bekerjasama membantu agensi ini. ... tidak bebangkit soal duplication kerana kita telah memutuskan di sini dalam soal penguatkuasaan undang-undang persekutuan di laut adalah merupakan kuasa yang ada pada APMM.*' (Emphasis added).

[17] It is therefore as clear as day light that the MMEA Act was intended to clothe the MMEA to enforce 'any offence under any federal law which is applicable in the Malaysian Maritime Zone' meaning 'the internal waters, territorial sea, continental shelf, exclusive economic zone and the Malaysian fisheries waters and includes the air space over the Zone'.

[18] Now was the sentencing and order of the learned magistrate proper and in accordance with the law. The prosecution submitted '... the sentence passed by the learned magistrate was in accordance with the law. The appellants had pleaded guilty as per charge and admitted the brief facts and all the exhibits tendered in court. Based on the grounds of judgment the court had considered all the mitigating factors before passing sentence and also applied the rule of discount in ascertaining the amount of fine'. At the magistrate court the prosecution had referred to the learned magistrate the cases of *Trans Huu Tho*

& 11 Ors v Public Prosecutor ; Nguyen Trong Hoang & 9 Ors v Public Prosecutor [2008] MLJU 860; [2009] 3 CLJ 102 and *Irwan bin Abdullah & Ors v Public Prosecutor* [2002] 2 MLJ 577; [2002] 3 CLJ 151 on the trend of sentencing.

[19] The prosecution also submitted that the order of forfeiture of the vessel together with all the appurtenance, the fish and the diesel are also proper, in order and accordance to law. The prosecution had referred to me s 52 of the Fisheries Act which provides that where any person is found guilty of any offence under s 15(1)(a) of the Fisheries Act 1985 the court shall in addition to any other penalty that may be imposed order forfeiture of vessel, fish etc. The prosecution also contended that the word *shall* in s 52 of the Fisheries Act 1985 must be construed as mandatory. The prosecution had referred to *Black's Law Dictionary*, (5th Ed) at p 1233 which defines the meaning of shall. The cases of *Bang Giok Kiom & Yang Lain lwn Public Prosecutor* [2011] 1 CLJ 643, *Public Prosecutor v Narongne Sookpavit & Ors* [1987] 2 MLJ 100, *Public Prosecutor v Ismail bin Yusof* [1979] 2 MLJ 119 and *Public Prosecutor v Sai & Ors* [1980] 2 MLJ 153 were also referred to me where it was decided that where the vessel and exhibits seized were used in the commission of offence the order of forfeiture should be made.

[20] Mr Sundram main challenge in this appeal is that the MMEA has no business to use the Fisheries Act and if I agree with him then the charge for which the accused had pleaded guilty would be null and void. But I have addressed all the arguments advanced by Mr Sundram on this challenge however I am not persuaded because after reading the provisions of both the MMEA Act and Fisheries Act I find the MMEA is empowered to enforce the provisions of the Fisheries Act. It is also my finding that the order of forfeiture by the learned magistrate was in accordance to law. It was for these reasons that I dismissed the accused appeal.

Appeal dismissed.

Reported by Ashok Kumar